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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Conservatorship of the Person of
JONATHAN S.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Petitioner and Respondent,

v.

JONATHAN S.,

Objector and Appellant.

D069621

(Super. Ct. No. MH111820)

APPEAL from a judgment of the Superior Court of San Diego County, Howard H. Shore, Judge. Affirmed.

Suzanne Davidson, under appointment by the Court of Appeal, for Objector and Appellant Jonathan S.

Thomas E. Montgomery, County Counsel, and George Seikaly, Deputy County Counsel for Petitioner and Respondent.

Jonathan S. appeals from a judgment establishing a one-year conservatorship over him under the Lanterman-Petris-Short Act (Welf. & Inst. Code, § 5000 et seq.; LPS Act), entered after a jury found him to be gravely disabled. He contends the court violated his right to due process and statutory right to change his counsel by not allowing his sister Nancy S., who is an attorney, to represent him at trial.¹ We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Jonathan was born in 1950 and raised in San Diego from the age of 10. His younger sister Nancy is an attorney. A conservatorship investigation report filed in October 2015 noted Jonathan had been diagnosed with schizoaffective disorder, bipolar type. Social Security Administration records indicated he had been receiving disability benefits under his parents since the age of 15. He had been hospitalized approximately 30 times for psychiatric decompensation since his first psychotic break in his teens.

Jonathan was first placed under an LPS conservatorship in 2005 after he overdosed on lithium following auditory hallucinations telling him to kill himself. Nancy was appointed his conservator. Between May 2012 and September 2015, Jonathan was placed under four temporary conservatorships. During that time period he sometimes lived with Nancy, his nephew Michael, and his niece Ashleigh. Jonathan reported difficulty living there. In 2013 he stated, "It's very difficult at home. I live with my sister and my nephew. They are always yelling and screaming Things are so bad at home,

¹ We will refer to Jonathan and his family members by their first names for ease of reference, intending no disrespect.

I'd almost take an overdose because they are always yelling and screaming at each other. I just as soon find a board and care home. I just have to get out of that house."

The referral for Jonathan's current conservatorship was initiated by psychiatrist Dr. Thomas Lian after Jonathan was admitted to Mercy Hospital's behavioral health unit in August 2015 and determined to be gravely disabled. On September 9, 2015, the San Diego County Public Conservator filed a petition for appointment of a conservator of Jonathan's person on the grounds he was gravely disabled, unable to provide for his basic needs as the result of a mental disorder, and unwilling or incapable of accepting treatment voluntarily. Nancy filed an opposition to establishment of the conservatorship. She argued that Jonathan was competent and did not need a conservator, but if a conservatorship were established, she should be appointed conservator.

On November 24, 2015, the court held a hearing on the petition and found beyond a reasonable doubt that Jonathan was gravely disabled as the result of a mental disorder. The court established a one-year conservatorship and appointed the public conservator to be Jonathan's conservator. The court found the least restrictive placement for Jonathan was a closed/locked treatment facility.

On November 30, 2015, Nancy filed a demand for a jury trial on Jonathan's behalf. On December 4, she filed a motion in support of the jury trial demand that included a request on behalf of Jonathan that she be substituted in as Jonathan's trial counsel. At a hearing on December 4, the court (Judge Steven E. Stone) granted Nancy's request, finding that under Code of Civil Procedure section 284, Jonathan had consented to have

Nancy substitute in as his counsel.² The court relieved the public defender as Jonathan's counsel.

At the time of trial on December 14, 2015, the public conservator brought a motion in limine to exclude testimony from Nancy regarding third party assistance she could provide Jonathan or, in the alternative, to disqualify her from acting as Jonathan's trial counsel. The court (Judge Shore) took the bench to address the motion, observing that the "heart of [the] motion" was that Nancy had a conflict of interest because she would be a witness at trial. The court concluded that Jonathan had a right to present evidence of third party assistance, but noted the motion raised the related issue of whether the court could allow Nancy to represent Jonathan. The court found that Nancy had a "vested interest in the outcome of this case that goes beyond just being an advocate, because she is a family member and she is, at least if not the proposed conservator, feels that the public conservator is not the appropriate party." The court relieved Nancy as Jonathan's counsel of record on the ground there would "be an extreme conflict of interest in [Nancy's] representation of [Jonathan]."

The issue of whether Jonathan was gravely disabled was tried to a jury in January 2016. Nancy was one of the witnesses who testified at trial. The jury returned a verdict finding Jonathan was gravely disabled, and the court entered judgment on the verdict. Jonathan does not challenge the finding that he was gravely disabled.

² Code of Civil Procedure section 284 provides, in relevant part: "The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows: [¶] 1. Upon the consent of both client and attorney, filed with the clerk, or entered upon the minutes[.]"

DISCUSSION

Jonathan contends the trial court's disqualification of Nancy as his attorney at trial violated his constitutional right to due process and his right under Code of Civil Procedure section 284 to representation by an attorney of his choice.³ We disagree.

The constitutional right to retain an attorney of one's choice "can be forced to yield if the court determines the appointment at issue will result 'in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.' " (*People v. Alexander* (2010) 49 Cal.4th 846, 872.) "The trial court has inherent power '[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto.' [Citation.] This inherent power includes authority to disqualify an attorney who violates California's ethics rules." (*Jun Ki Kim v. The True Church Members of Holy Hill Community Church* (2015) 236 Cal.App.4th 1435, 1452 (*Jun Ki Kim*).) Thus, a court may properly disqualify counsel of choice if there is a conflict of interest that " 'affects the fundamental principles of our judicial process.' " (*Kennedy v. Eldridge* (2011) 201 Cal.App.4th 1197, 1204 (*Kennedy*).)

" '[D]etermining whether a conflict of interest requires disqualification involves more than just the interests of the parties. [¶] . . . Ultimately, disqualification motions

³ Jonathan acknowledges that he does not have a Sixth Amendment right to counsel in an LPS proceeding because the Sixth Amendment provides the right to counsel "[i]n all criminal prosecutions." (U.S. Const., 6th Amend.; *In re Conservatorship of Estate of David L.* (2008) 164 Cal.App.4th 701, 710.) However, Welfare and Institutions Code section 5365 of the LPS Act provides for appointed counsel for a conservatee or proposed conservatee.

involve a conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility. [Citation.] The paramount concern must be to preserve public trust in the scrupulous administration of justice and the integrity of the bar.' " (*Jun Ki Kim, supra*, 236 Cal.App.4th at p. 1452.) "On review, the standard is 'abuse of discretion.' [Citation.] The party resisting disqualification bears the burden of establishing the facts making disqualification inappropriate, and we 'accept[] as correct all of [the trial court's] express or implied findings supported by substantial evidence.' " (*Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566, 1573, fn. omitted.)

We conclude the court did not abuse its discretion in disqualifying Nancy from representing Jonathan. The court reasonably concluded there was a conflict of interest in Nancy's representation of Jonathan that subordinated Jonathan's due process and statutory right to counsel of his choice to the paramount concerns of the preservation of the public trust in the administration of justice and the integrity of the bar. (*Jun Ki Kim, supra*, 236 Cal.App.4th at p. 1452.)

The court disqualified Nancy under the " 'advocate-witness rule,' which prohibits an attorney from acting both as an advocate and a witness in the same proceeding, has long been a tenet of ethics in the American legal system" (*Kennedy, supra*, 201 Cal.App.4th at p. 1208.) " 'If a lawyer is both counsel and witness, [the lawyer] becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who

becomes a witness is in the unseemly and ineffective position of arguing [her] own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.' " (*People v. Donaldson* (2001) 93 Cal.App.4th 916, 927-928 (*Donaldson*), quoting former ABA Model Code Prof. Responsibility, EC 5-9.) Further, "[c]ombining the roles of advocate and witness can prejudice the opposing party' and confers on the opposing party 'proper objection where the combination of roles may prejudice that party's rights in the litigation.' [Citation.] 'A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.' " (*Donaldson, supra*, at p. 929.)

"[T]he State Bar [of California] has adopted a rule of professional conduct that prohibits, with few exceptions, a lawyer from acting as both advocate and witness [citation]" (*Donaldson, supra*, 93 Cal.App.4th at p. 927, citing Cal. Rules of Prof. Conduct, rule 5-210 (rule 5-210).) Rule 5-210 states:

"A member shall not act as an advocate before a jury which will hear testimony from the member unless:

"(A) The testimony relates to an uncontested matter; or

"(B) The testimony relates to the nature and value of legal services rendered in the case; or

"(C) The member has the informed, written consent of the client. . . ."

Citing this rule, the California Supreme Court stated: "An attorney must withdraw from representation, absent the client's informed written consent, whenever he or she knows or should know he or she ought to be a material witness in the client's cause.

[Citations.] . . . An attorney should 'resolve any doubt in favor of preserving the integrity of his testimony and against his continued participation as trial counsel.' "

(*People v. Dunkle* (2005) 36 Cal.4th 861, 915 (*Dunkle*), disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) Even if an advocate-witness has obtained the informed written consent of his or her client, the trial court has discretion to disqualify counsel where he or she is a material witness in the case. (*Lyle v. Superior Court* (1981) 122 Cal.App.3d 470, 482 (*Lyle*).) In exercising that discretion, a trial court weighs the hardship to the client if substitute counsel is required against any detriment to the opposing party or injury to the integrity of the judicial process if counsel is not disqualified. (*Id.* at pp. 482-483; see also *Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4th 573, 579-581; *Reynolds v. Superior Court* (1986) 177 Cal.App.3d 1021, 1028.)

In the present case, Nancy did not obtain Jonathan's written consent to act as both a witness and advocate, but argues that she substantially complied with rule 5-210 because Jonathan twice stated on the record that he wanted Nancy to represent him.⁴ Assuming Jonathan's oral consent was sufficient to comply with rule 5-210(C), we

⁴ During a *Marsden* hearing (*People v. Marsden* (1970) 2 Cal.3d 118) after the court relieved Nancy as Jonathan's counsel, Jonathan stated that he preferred appointed counsel Thomas Ziegler remain his attorney unless Nancy could be his attorney.

nevertheless conclude the court did not abuse its discretion in relieving Nancy as Jonathan's counsel.

The trial brief that Nancy filed on behalf of Jonathan reflects that she was deeply invested emotionally in the case. Nancy argued that the court had refused to consider Jonathan's choice of her as conservator "due to some libelous comment made by staff [of] Dr[.] Lian and almost every other doctor who saw [Jonathan] were told to keep up the theme of the 'Chaotic Family'. . . ." Nancy referred to a "conspiracy to smear the family [that] was orchestrated by the Public conservator office, Scripps Mercy Hospital and Dr[.] Lian." She argued that Jonathan "does not fit the criteria of gravely disabled at the present time as he has a family ready willing and able to help him with basic necessities as they always have." She asserted that Dr. Lian and Scripps Mercy "harassed the family, set them up to make it look like [Nancy] is not a responsible person when in fact she is and in fact she has always been and continues to be there for Jon." Nancy concluded the brief by stating: "Jon has never done worse since he has been imprisoned by Scripps Mercy and the Public Conservator's office. His sister will take him into her home or send him to an assisted living facility on her."

Regarding Nancy's conflict of interest, the trial court noted: "Now, it's obvious from [Nancy's] passionate argument that she loves her brother dearly and that she's taken care of him all of her life. That supports the idea that you have a vested interest in the outcome of this case that goes beyond the interests of an advocate. You're a family member; you have a brother you care deeply about." The court continued: "I have no prejudgments about the outcome of this case. . . . But I do have an interest in ensuring

that both sides receive a fair trial, and that supersedes any specific ethical canon. [¶] In this case it's clear that [Nancy], whether or not she ends up testifying, has a vested interest in the outcome of this case that goes beyond just being an advocate, because she is a family member and she is, at least if not the proposed conservator, feels that the public conservator is not the appropriate party." The court noted "there is a possibility that [Nancy] could testify or that, if she doesn't, a family member could testify, the same conflict exists whether it's a family member or [Nancy]." Accordingly, the court disqualified Nancy as Jonathan's counsel on the ground she had an "extreme conflict of interest in [her] representation of [Jonathan]."

The trial court reasonably found that Nancy had a nonwaivable conflict of interest—i.e., that her personal interest and emotional investment in defeating Jonathan's conservatorship would create conflict and confusion between her role as witness with the responsibility of telling the truth and her role as an advocate with the responsibility of obtaining whatever result was in Jonathan's best interest. (See *Kennedy, supra*, 201 Cal.App.4th at p. 1209.) As the *Kennedy* court noted, "[t]hese duties may not necessarily be coextensive and where they are not, [counsel] may not be permitted to choose between them." (*Ibid.*)

There is nothing in the record indicating Jonathan suffered any hardship as a result of being represented by appointed counsel instead of Nancy at trial, and Jonathan does not claim he received ineffective assistance of counsel. Notwithstanding Jonathan's consent to Nancy's representation, the court acted within its discretion by disqualifying

Nancy as Jonathan's counsel in the interests of ensuring that both sides received a fair trial and protecting the integrity of the judicial process.

DISPOSITION

The judgment is affirmed.

HUFFMAN, J.

WE CONCUR:

BENKE, Acting P. J.

HALLER, J.